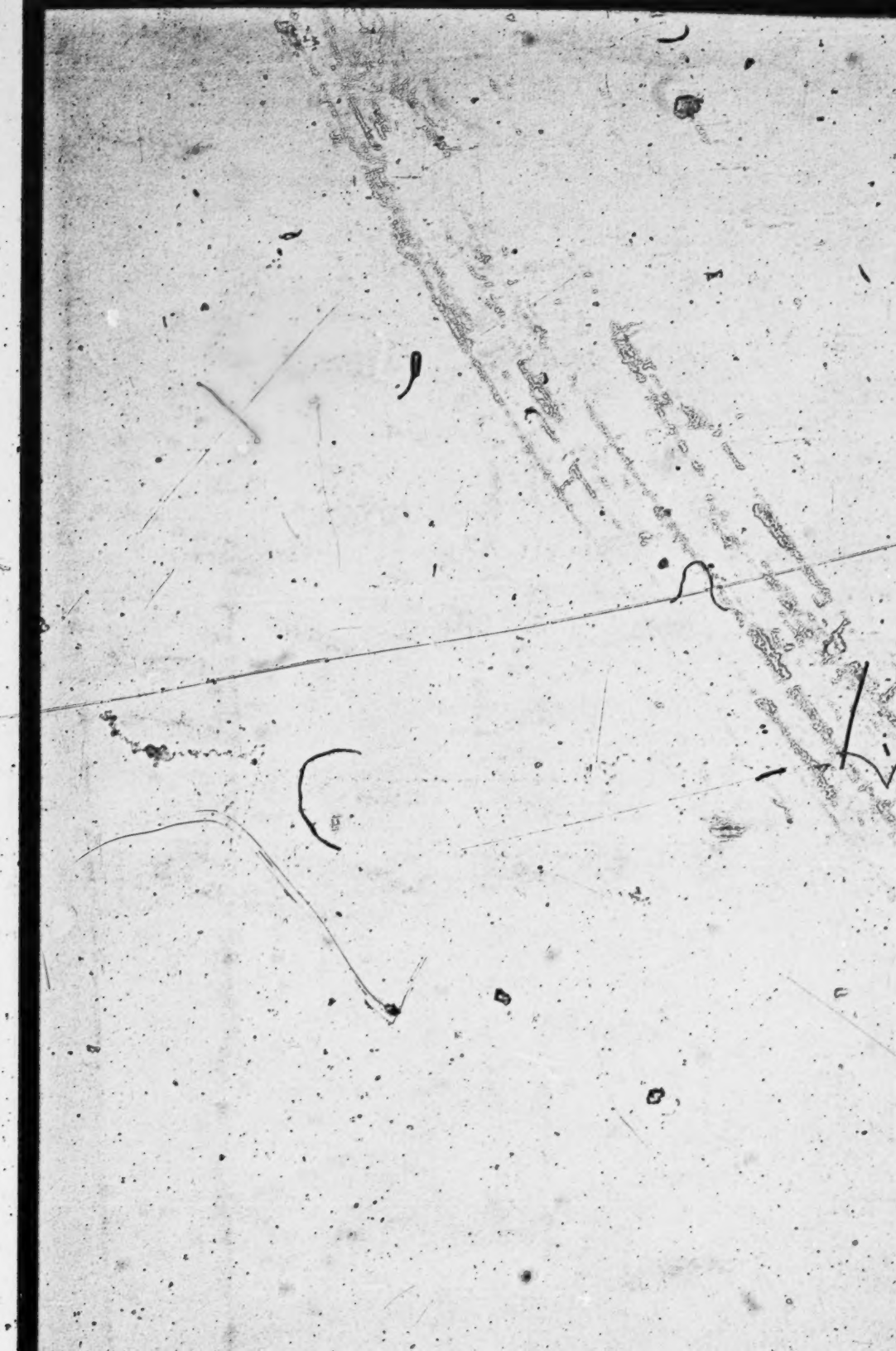

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# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1968**

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## No. 642

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EDWARD BOYKIN, JR.,

*Petitioner,*

v.

STATE OF ALABAMA,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

---

## BRIEF FOR PETITIONER

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# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1968**

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## No. 642

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EDWARD BOYKIN, JR.,

*Petitioner,*

v.

STATE OF ALABAMA,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

---

## BRIEF FOR PETITIONER

---

Petitioner prays for review of error in the opinion and judgment of the Supreme Court of Alabama entered in the above entitled case on February 8, 1968 (A 36-42), pursuant to which petitioner is sentenced to death by electrocution.

### Citations to Opinions Below

The opinion of the Supreme Court of Alabama rendered on February 8, 1968 is unreported as of this date, but is found in the Appendix hereto, pp. 36-41. A dissenting opinion, with three (3) judges concurring, was included with the opinion.

On February 22, 1968, petitioner filed an Application for re-Hearing and notification of the filing of the Application for re-Hearing and Certificate of Recall was duly filed by petitioner, but the Supreme Court of Alabama by order dated March 7, 1968 overruled the Application (A 43).

On March 18th, the Supreme Court rendered an order on petitioner's Application for a stay of execution pending an appeal to the Supreme Court of the United States, and by the same order, re-set the date for the execution of the judgment and sentence for Friday, June 28, 1968 (A 44), and by further order of the Supreme Court of Alabama, a stay of execution pending consideration of a Petition for Writ of Certiorari by the Supreme Court of the United States was granted on June 17, 1968. (A 45)

## Jurisdiction

A motion for leave to proceed *in forma pauperis* and a Petition for Writ of Certiorari was filed on June 4, 1968 in the Supreme Court of the United States and certiorari was granted on October 14, 1968. (A 46)

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

## Statute Involved

The statutory provision involved is Title 14, Section 415, *Code of Alabama,* Recompiled 1958, which is set out herewith:

"Section 415 Punishment of Robbery.—Any person who is convicted of robbery shall be punished, at the discretion

of the jury, by death, or by punishment in the penitentiary for not less than ten (10) years."

## Questions Presented

1. THE IMPOSITION OF THE DEATH PENALTY FOR ROBBERY CONSTITUTES A CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

2. THE SUPREME COURT OF ALABAMA FAILED TO PROTECT PETITIONER'S RIGHT TO DUE PROCESS WITH REGARD TO HIS PLEA OF GUILTY.

3. THE SENTENCE OF DEATH IMPOSED ON THE PETITIONER BY THE ALABAMA JURY VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

## Statement of the Case

Edward Boykin, Jr., a twenty-seven (27) year old Negro, son of a tenant farmer from Wilcox County, Alabama, was convicted on his pleas of guilty to five (5) separate indictments of robbery.* One jury heard all five (5) cases simultaneously and sentenced him to death by electrocution for each offense.

The essential facts are as follows:

Edward Boykin, Jr. was indicted by a grand jury on June 29, 1966 on five (5) counts of robbery and bail was set at $2,500.00 (A 2). Petitioner was appointed counsel on Mon-

* The common law prevails in Alabama as to the offense of robbery, and Title 14, Section 415, *Code of Alabama*, Recompiled 1958, merely prescribes the punishment therefor.

day, July 11, 1966, after a determination of indigency, and was arraigned on the five (5) indictments of robbery three days later, July 14, 1966, at which time he pled guilty (A 2, 3, 4).

On September 20, 1966, the accused was brought to trial on each of the five (5) robbery indictments before a jury and on his plea of guilty, the prosecutor presented a prima facie case on each offense through testimony of witnesses:

1. James V. Loper, manager of a grocery-chain store, testified that on May 8, 1966, at about 11:00 P.M., the accused and another Negro came in the store, pulled a gun and made the witness and another employee lie down on the floor while money was removed from the cash register (A 11). The witness further testified that:

> "A. Well, after he (the accused) got the money, he turned and goes out the door and shoots back to see that we don't get up and follow him, I guess." (A 12)

The witness went on to testify that the bullet entered the door and went up into the ceiling. (A 13)

The Defense did not question the witness.

2. Annette Fawcett, a drug store owner, testified on May 6th at about 9:00 P.M., two customers came into her store (one of whom she identified as the accused), produced a gun and took money from her cash register (A 18). When the accused had difficulty with the car keys, the gun went off and went into the floor; it ricocheted and hit the calf of a girl's leg, who was in the store. The witness testified on direct examination:

"A. I think maybe he intended to shoot just to frighten because the officer said it hit the floor and, you know." (A 20)

The cross examination focused on the discharge of the weapon wherein the witness again testified:

"A. I don't believe that he really intended to kill her, but . . . ." (A 21)

3. Jerry Smith, an employee of a retail ice cream business, stated that on April 23, 1966, at about 11:40 P.M., he was met by the accused at the rear door of the establishment. The accused produced a gun and after entering the place, took money from the cash register. (A 23)

The Defense did not question the witness.

4. John E. G. Campbell, operator of a combination service station, grocery and general merchandising store, stated that on May 5, 1966, at about 8:00 P.M., the accused and an accomplice entered his store. They held him up and took some money from the cash register. Frustrated in an attempt to take the witness's car, the accused and his accomplice ran down the street away from Mr. Campbell's place of business. (A 27)

The Defense did not question the witness.

5. Sylvester Pugh, a service station operator, testified on May 3, 1966, he was about to close for the night when two individuals (one being the accused) produced a .45 caliber pistol and took money from the cash register where he was counting it. After having the witness walk away

from the station (one-half block), the accused departed. (A 30)

The Defense did not question the witness.

6. Walter Hersh, the owner of the ice cream parlor, testified that he was not present during the robbery, but because it was his property that was taken, he was called to his place of business. (A 25)

The Defense did not question the witness.

At the conclusion of the Prosecution's evidence, the Defense offered no evidence for the accused as to any of the offenses, nor was any evidence offered by defense counsel in mitigation or extenuation of the offenses. (A 31)

The trial court then proceeded to instruct the jury with regard to the law of robbery, and it appears from the trial court's opening remarks that some of the jurors had just that week sat on other robbery cases. (A 32) After the conclusion of the oral charge by the Court, a juror asked the Court:

> Juror: "We have five cases. These sentences will not run concurrently, will they?"
>
> Court: "They will not run concurrent unless the jury requests it."

Whereupon the jury, which under the law of the State of Alabama for the offense of robbery finds the verdict and sets the sentence in one single deliberative session, retired. Later, delivering five (5) verdict-sentence pronouncements of guilty and death by electrocution. (A 32-33)

On September 21, 1966, having neglected to set the date for execution, the Court reimposed the sentence to death by electrocution and set the date of execution as December 16, 1966.

An appeal was automatically ordered by the Court as is required in capital sentences, but no attorney was appointed, by the Court order, to prosecute the appeal although indigency had previously been determined.

Soon thereafter, on October 5, 1966, Donald Jelinek, Esquire, a member of the staff of Lawyer's Constitutional Defense Committee of the American Civil Liberties Union in Selma, Alabama, voluntarily undertook the appeal on behalf of the Petitioner, but was notified on October 10, 1966, by the Deputy Clerk of the Supreme Court of Alabama, that he was not authorized to practice before that Court.

On October 25, 1966, present counsel, a co-operating attorney of the American Civil Liberties Union, through its affiliate in the State of Alabama, was contacted by Mr. Jelinek and agreed to undertake the appeal. It was too late at this date, however, to raise any issue on Motion for a New Trial, as the statutory time-period had elapsed.

Briefs were submitted in support of the appeal, but the Supreme Court of Alabama affirmed by opinion dated February 8, 1968. During that time and until now, Edward Boykin, Jr. has been on death row in Kilby Prison, Montgomery, Alabama awaiting execution for robbery.

# ARGUMENT

## I.

**The Imposition of the Death Penalty for Robbery Constitutes a Cruel and Unusual Punishment in Violation of the Eighth and Fourteenth Amendments.**

Edward Boykin, Jr., awaiting execution in a death row cell at Kilby Prison in Montgomery, Alabama, is a unique person—few are similarly situated and few could be.

Edward Boykin, Jr. was not sentenced to death because he committed five (5) robberies—many others do as much and more without being sentenced to die for it. Nor was he sentenced to death because he (i) committed five (5) robberies (ii) in Alabama—although there are very few other places where it would be possible, let alone probable, that he would be so sentenced for such a crime. He probably was not sentenced to death because he (i) committed five (5) robberies (ii) in Alabama and (iii) is poor and black—although all these elements were important. The additional indispensable elements are probably known, consciously or subconsciously, only by the jury which condemned him to die.

The point is that Edward Boykin, Jr. is unique because today the imposition of the death penalty is unique.

As this brief will show, there is a growing realization that the death penalty is unwarranted in principle and requires so rare a combination of people, places and prejudice as to border on a grotesque fluke.

And because the death penalty is today both unwarranted and a fluke, it is "cruel and unusual" and unconstitutional* as applied to Edward Boykin, Jr.

A. The Meaning of "Cruel and Unusual Punishment" Is to Be Drawn From Our Contemporary Standards and Mores.

The concept of cruel and unusual punishment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems* v. *United States*, 217 U.S. 349, 378 (1910). Likewise, the Due Process Clause "is not confined within a permanent catalogue of what may at a given time be deemed the limit or the essentials of fundamental rights . . ." *Wolf* v. *Colorado*, 338 U.S. 25, 27 (1949).

Notwithstanding the inherent ambiguity of the language, this Court has indicated that semantic exercises are unnecessary and that "the meaning (of unusual) should be the ordinary one, signifying something different from that which is generally done." *Trop* v. *Dulles*, 356 U.S. 86, 110 n. 32 (1958). Similarly, the concept of "cruel" is not confined to the disgusting and savage penal practices of an earlier era.

The dynamic quality of the Eighth Amendment's proscription, so clearly articulated in *Weems*, was reasserted by this Court in *Trop supra*. In holding that deprivation of citizenship for wartime desertion constituted "cruel and

* The Fourteenth Amendment incorporates the protections of the Eighth Amendment and applies to the States as well as the Federal Government. E.g., *Robinson* v. *California*, 370 U.S. 660 (1962).

unusual" punishment, Mr. Chief Justice Warren emphasized that:

> "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards . . . The Court (has) recognized . . . that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 100-101.

See also, *Robinson* v. *California*, 370 U.S. 660 (1962) especially, Douglas, J. concurring, *id.* at 676 ("The Eighth Amendment expresses the revulsion of civilized man against barbarous acts—the 'cry of horror' against man's inhumanity to his fellow man").

Thus, the Supreme Court of Alabama clearly was wrong in ignoring the evolving nature of the meaning of "cruel and unusual" and stating, "(a)ny punishment declared by statute for an offense which was punishable in the same way at common law could not be regarded as cruel or unusual in the constitutional sense." (A 38)

B. The Petitioner Stands Virtually Alone in Facing the Death Penalty for a Property Crime Like Robbery.

The evidence is irrefutable that throughout the civilized world there has been a startling decline* in the use of capital punishment.

> "Today more than seventy nations and thirteen of our states have generally abolished the death penalty. While most states and the federal system reserve the ultimate sanction, it has been rarely used in recent years. There were 199 executions in the United States in 1935. There was only one in 1966; two in 1967. Only one person has been executed under any of the 29 federal statutes authorizing death in the past decade." Attorney General Clark, Hearings on S. 1760, Subcommittee on Criminal Laws and Procedures, Senate Judiciary Committee (July 2, 1968).

The statistics tell only a part of the story. Accompanying, and contributing to, the precipitous decline in the use

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* The following table indicates the total executions for all crimes in the United States and Alabama for the period 1930–1967:

| Year | Total Executions in U.S. | Total Executions in Alabama |
|---|---|---|
| 1930–34 | 776 | 19 |
| 1935–39 | 891 | 41 |
| 1940–44 | 645 | 29 |
| 1945–49 | 639 | 21 |
| 1950–54 | 413 | 14 |
| 1955–59 | 304 | 6 |
| 1960 | 56 | 1 |
| 1961 | 42 | 1 |
| 1962 | 47 | 1 |
| 1963 | 21 | 0 |
| 1964 | 15 | 1 |
| 1965 | 7 | 1 |
| 1966 | 1 | 0 |
| 1967 | 2 | 0 |

Source: 42 *National Prisoner Statistics Bulletin*, Table 15 (June, 1968)

of the death penalty has been a mounting storm of public criticism of this barbaric custom. This Court has noted that public opinion polls show that more Americans now oppose rather than favor capital punishment for convicted murderers. *Witherspoon* v. *Illinois*, 391 U.S. 510, 520, at n. 16 (1968). This reflects the continuing trend toward abolition. See Bedau, "The Courts, The Constitution and Capital Punishment", 1968, *Utah Law Review* 201, 206 (May, 1968).

Direct evidence to support the view that there is a widespread antipathy to the death penalty can be found in the statements of prospective jurors in capital cases as in *Witherspoon* v. *Illinois, supra* at 514, where "47 veniremen were successfully challenged for cause on the basis of their attitudes toward the death penalty."

Fear of error and reluctance to actually apply the prescribed penalty have led to an intolerable situation where, at the end of 1967, over four hundred prisoners were incarcerated under sentence of death; these unfortunate individuals have been awaiting death a median elapsed time of 29 months since being sentenced. 42 *National Prisoner Statistics Bulletin*, Table 10 (June, 1968). This situation creates its own form of cruelty.

The uniqueness of Edward Boykin, Jr.'s plight is underscored by the fact that he is to die for a property crime--only eleven of the fifty states presently retain death as a possible punishment for robbery and/or burglary, the only property crimes which realistically can be said to be punishable by death.*

* Robbery and burglary are the only property crimes for which anyone has been executed since 1930 when such statistics began

Georgia, under the new criminal code effective July 1, 1969, abandoned the death penalty for robbery. The Criminal Law Study Committee noted:

> "Under the present law robbery by force and robbery by the use of an offense weapon may result in the death penalty. The death penalty is not warranted for theft alone, regardless of aggravated circumstances, unless death results, in which case the death penalty is possible under homicide provisions. A proposed penalty of one to 20 years' imprisonment should be broad enough to cover all incidents of robbery, no matter how committed." Committee Notes, chapter 26-19, Georgia Code Annotated (1968).

As discussed below, common law robbery requires only larceny by putting in fear, (rather than actual violence) and Alabama juries under the present statute could conceivably punish by death one who demands another's property on threat of a slap in the face. Alabama stands alone as the only State in the union which retains the death penalty for common law robbery.

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regularly to be compiled. 42 *National Prisoner Statistics Bulletin*, Table 3 (June, 1968).

The following states retain death as a punishment for robbery and/or burglary: Ariz. Rev. Stat. §13-644 (train robbery); Code of Ala., Tit. 14, §415 (robbery); §416 (train robbery) and §85 (first degree burglary); Ga. Code Annot. §26-2502 (robbery by open force or violence); Ky. Rev. Stat. §433.140 (armed robbery and armed burglary); Miss. Code Annot. §2364 (armed robbery); Vernon's Annot. Mo. Stat. §560.135 (robbery by means of a deadly weapon); N.C. Gen. Stat. §14-52 (first degree burglary); 21 Okla. Stat. Annot. §801 (armed robbery); Tenn. Code Annot. §39-3901 (robbery with a deadly weapon); Vernon's Annot. Tex. Pen. Code §1408 (robbery by violence or with a deadly weapon); and Code of Va. Tit. 18.1-86 (burglary).

For a listing of other property crimes nominally punishable by death, see Bedau, *The Death Penalty in America*, 43-45 (rev. ed. 1967).

Even in those few states which do retain the death penalty for robbery, it has been rarely imposed; the last execution for robbery in the United States was in 1962. The following table clearly reflects the current general disuse of the death penalty for property crimes:

TOTAL U. S. EXECUTIONS FOR PROPERTY CRIMES

| Year | Robbery | Burglary | Total |
|---|---|---|---|
| 1950 | 1 | 0 | 1 |
| 1951 | 1 | 0 | 1 |
| 1952 | 0 | 0 | 0 |
| 1953 | 0 | 0 | 0 |
| 1954 | 1 | 0 | 1 |
| 1955 | 2 | 0 | 2 |
| 1956 | 0 | 0 | 0 |
| 1957 | 0 | 1 | 1 |
| 1958 | 1 | 0 | 1 |
| 1959 | 0 | 0 | 0 |
| 1960 | 1 | 0 | 1 |
| 1961 | 0 | 0 | 0 |
| 1962 | 1 | 0 | 1 |
| 1963 | 0 | 0 | 0 |
| 1964 | 0 | 0 | 0 |
| 1965 | 0 | 0 | 0 |
| 1966 | 0 | 0 | 0 |
| 1967 | 0 | 0 | 0 |

Source: *National Prisoner Statistics Bulletin* for the years 1950–67.

The conclusion is inevitable. The progress of our civilization, marked by an increasing awareness of the sanctity of human life and the dignity of man, no longer tolerates the penalty of death for the crime of robbery.

C. The Death Penalty for Property Crimes Is Now Reserved Exclusively for Negroes.

It is well recognized that the death penalty has been applied in a discriminatory fashion in this country.

> "Clarence Darrow observed that, 'from the beginning, a procession of the poor, the weak, the unfit, have gone through our jails and prisons to their deaths. They have been the victims.' It is the poor, the weak, the ignorant, the hated who are executed. Racial discrimination occurs in the administration of capital punishment. Since we began keeping records in 1930, there have been 2,066 Negroes, and 1,751 white persons put to death, although Negroes made up only one-eighth of our population. Of the 455 men executed for rape, 405 were Negroes." Att. Gen. Clark, Hearings on s. 1760, Subcomm. on Criminal Laws and Procedures, Senate Judiciary Committee (July 2, 1968).

Alabama is no exception to the disturbing pattern. Since 1930 the state has executed 135 persons; of these 107, or 80%, have been black. 42 *National Prisoner Statistics Bulletin*, Table 3 (June, 1968).

Responsible observers have rejected the possibility that a higher crime rate among the poor generally and Negroes specifically accounts for the grossly disproportionate number of Negroes executed and negates discrimination:

> "Even conceding this to be so (that the disproportionate number of crimes committed by the poor and members of minority groups accounts for the disproportionate imposition of the death penalty in those groups), there is inequality. For instance, rape is a

capital offense in the Southern States. During 1930-1960, there were 434 executed for this crime. Of those only 42 were white. In the states of Florida, Louisiana, Mississippi and Virginia, all the 90 persons executed for rape were Negroes.

"Four states provide the death penalty for burglary, but only North Carolina and Alabama have executed anybody for that crime in the last thirty-one years. The 11 persons executed were all Negroes. It is not reasonable to assume that only Negroes committed the rapes and burglaries in those states. What is reasonable is that white persons who committed such crimes benefited from more favorable decisions by juries and pardon authorities—receiving life sentences, lesser punishment and commutations." Penn. Joint Legis. Comm. on Capital Punishment, *Report,* 14-15 (1961).

History shows clearly that white America will not now execute whites for property crimes and that the death penalty for such crimes is reserved exclusively for Negroes like Edward Boykin, Jr. No white man has been executed for a property crime in this country during the last 18 years. See National Prisoner Statistics Bulletins for the years 1950-67. During that period, however, nine Negroes were executed for such crimes (8 for robbery and 1 for burglary). *Ibid.*

During the period 1930 through 1967, 19 of the 25 men executed for property crimes were Negroes. 42 *National Prisoner Statistics Bulletin,* Table 3 (June, 1968). Using the longer period as a basis, it is plain that the practice of executing whites for property crimes is not widespread

—only three jurisdictions accounted for all 6 of such white men (Federal 2, Kentucky 3 and Oklahoma 1). *Ibid.*

Turning to Alabama, the State executed 7 men for property crimes (robbery 5 and burglary 2) from 1930 through 1967—and all were Negroes. *Ibid.* The State of Alabama contends that this latter statistic is in error and asserts that one white man was executed for robbery on September 4, 1964. *Cobern* v. *State,* 273 Ala. 547, 142 So. 2d 869. If error, the ratio of 7 to 1 is as disproportionate with regard to population as was the crime of James W. Cobern to the crimes committed by Edward Boykin, Jr. James W. Cobern, according to the case report, murdered his victim by beating in her skull, shooting a .22 caliber rifle bullet in the chest, puncturing her vaginal area with a poker and then after she was dead, robbed her of her car. The crimes are unequal and the justice is unequal.

The imposition of the death sentence on Edward Boykin, Jr. is part of this pattern of unequal justice and thereby constitutes "cruel and unusual" punishment under any reasonable construction of those words.

D. It Violates the "Eighth Amendment" to Take a Human Life for a Crime Where No Life Was Taken and No Serious Injury Inflicted.

Courts considering the Eighth Amendment have sometimes asked whether the punishment "because of its severity (is) shocking to the sense of justice to the people of the United States . . . " *United States* v. *Ragen,* 54 F. Supp. 973, 981 (N.D. Ill. 1944) aff'd 146 F.2d 349 (1945). See, also, *Francis* v. *Resweber,* 329 U.S. 459, 473 (1947) ("shocks the most fundamental instincts of civilized man") (Burton, J., dissenting).

The facts in the instant case present such a shocking situation because Edward Boykin, Jr. is to lose his life when he neither took another life nor caused serious injury. Even under a retributive theory of punishment, "an eye for an eye; a tooth for a tooth," one cannot possibly make petitioner's punishment fit his crime.

Petitioner took less than twelve hundred dollars from five retail establishments. He did not kill or seriously injure anyone. On the two occasions when his gun apparently discharged, there was testimony that he did not intend to kill or seriously harm. (A 12, 15, 21)

As noted above, Georgia recently repealed the death penalty for robbery on the very ground advanced here. The Criminal Law Study Committee determined that "(t)he death penalty is not warranted for theft alone, regardless of aggravated circumstances unless death results, in which case the death penalty is possible under homicide provisions." Committee Notes, chapter 26-19, Ga. Code Ann. (1968).

In light of the foregoing, execution of the petitioner for robbery is an affront to the fundamental concepts of justice underlying the Eighth Amendment.

### E. Execution of the Petitioner for the Crime of Robbery Is So Disproportionate to the Offense as to Amount to Cruel and Unusual Punishment Under the Eighth Amendment.

When the penalty for a particular crime is so excessive as to be regarded as disproportionate to the offense

charged, it falls under the Eighth Amendment prohibition against cruel and unusual punishment.*

This interpretation of the Eighth Amendment was applied by this Court over fifty years ago in *Weems* v. *United States*, 217 U.S. 349 (1910). In determining whether the prescribed punishment for the crime of forging official documents was so excessive as to be "cruel and unusual" the majority of the court said:

> "... we turn back to the law in controversy. Its character and the sentence in this case may be illustrated by examples even better than it can be represented by words. *There are degrees of homicide that are not punished so severely,* nor are the following crimes: misprision of treason, inciting rebellion, conspiracy to destroy the government by force, recruiting soldiers in the United States to fight against the United States ...." *Id.* at 380 (emphasis added).

The Court went on to contrast the penalties prescribed for the offense of forgery or counterfeiting of government securities similar to that for which Weems was convicted and concluded that:

> "... the highest punishment possible for a crime which may cause the loss of many thousands of dollars, and to prevent which the duty of the State should be as eager to prevent the perversion of truth in a public

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* This basic principle was recognized by Justice Field in his dissenting opinion in *O'Niel* v. *Vermont*, 144 U.S. 323, 339, 40 (1892):

"The inhibition (of the Eighth Amendment) is directed against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged."

document, it is not greater than that which may be imposed for falsifying a single item of a public account. *And this contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice.* The state thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal." *Id.* at 381. (emphasis added)

Thus the Court defined disproportionality with reference to similar or more serious crimes carrying a lesser penalty. This disparity rendered the punishment cruel and unusual within the meaning of the Eighth Amendment. Judged by the comparative standard articulated in *Weems* the petitioner's sentence is grossly disproportionate to the crime of robbery.

For example, in the State of Alabama, murder in the second degree is "the unlawful killing of a human being with malice, but without deliberation or premeditation." *Miller* v. *State,* 145 Ala. 677, 40 So. 47, 48 (1906) (See also Code of Ala., Tit. 14, §314 (1959)) and it is punishable by imprisonment "for not less than ten years, at the discretion of the jury." Code of Ala., Tit. 14, §318 (1959). Thus, even though life be taken the maximum punishment is life imprisonment.

Similarly, any person convicted of mayhem (which includes such grisly deeds as maliciously and intentionally cutting out a person's tongue, putting out an eye and tearing off a limb), an assault with intent to murder, or an assault with a deadly instrument upon a peace officer in performance of his duties, can receive no higher punishment than twenty years imprisonment. Code of Ala., Tit. 14, §359 and 38 (1959) respectively.

By comparison robbery may be punished by "death or by imprisonment in the penitentiary for not less than ten years." Code of Ala., Tit. 14, §415 (1959). As Alabama retains the common law definition of robbery, the offense can consist of taking property from the person of another without any direct application of force. A "putting in fear" or mere *threat* of violence will suffice. See *Wilson* v. *State*, 268 Ala. 86, 105 So.2d 66 (1958). Thus the commission of petit larceny plus verbal threats amounting to simple assault can result in a robbery conviction in Alabama. As the death penalty may be applied to such conduct under the sentence statute, there can be no assurance of any rational relationship between the acts committed and punishment imposed. The breadth of conduct embraced by the common law definition renders the punishment capricious. The contrast between the penalty for robbery and punishments prescribed for other crimes which involve a much greater threat to life, illustrates use of the "unrestrained power" by the Alabama legislature. The Eighth Amendment reflecting fundamental concepts of human dignity demands a rational nexus between crime and punishment. See *Robinson* v. *California*, 370 U.S. 660 (1962), especially Douglas, J., concurring, 370 U.S. at 676.

As Petitioner's case exemplifies, the dangers of great disproportionality are not academic. His life is to be taken

where he himself did not take life or seriously injure. In addition, the death penalty was uniformly applied to all his offenses irrespective of the varying gravity of his conduct.

Thus, under the *Weems* formula, execution of the Petitioner is most assuredly a punishment so disproportionate to the offense as to be "cruel and unusual."

F. The Permissible Aims of Punishment May Be Achieved and Society's Needs Served by Punishing Robbery Otherwise Than by Death.

The principal objectives served by punishing an individual for the commission of a crime are: (1) *retribution*, or the vindication of the community's emotional desire to punish an offender; (2) *reformation and rehabilitation*, or the conversion of the convicted offender into a noncriminal member of society; (3) *deterrence*, or the discouragement of others from the commission of like offenses; (4) *isolation*, or the removal of the offender from society to prevent a recurrence of criminal activity during the period of confinement; and, (5) the reaffirmation of community norms in an attempt to maintain respect for law by condemnation of criminal acts. See, "Note, Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court", 16 *Stan. L. Rev.* 996, 1011-1013 (1964).

As modern penology has focused increasingly on the criminal and not merely on the nature of the crime committed, the retributive aim of punishment has fallen into disfavor.* This Court has recognized that isolation, "de-

* The highest courts of New York and California have declared that treatment of criminal offenders should be directed toward deterrence, isolation, and rehabilitation. In *People* v. *Oliver*, 1 N.Y. 2d 152, 160, 134 N.E. 2d 197, 201-202, 151 NYS 2d 367, 373

terrence and reformation" are the proper objectives of punishment rather than "retaliation and vengeance." *Morrissette* v. *United States*, 342 U.S. 246, 251 (1952); see also *Williams* v. *New York*, 337 U.S. 241, 248 (1949); and *Trop* v. *Dulles*, 356 U.S. 86, 111 (1958) (concurring opinion of Mr. Justice Brennan).

The death penalty does not properly serve the permissible goals of isolation and rehabilitation. It is clearly excessive with regard to the former and negates any possibility of the latter.

The argument that capital punishment must be retained as a necessary deterrent to contemplated crimes has now been discredited in face of mounting evidence to the contrary.

Recent studies have shown that in comparing homicide rates in capital and non-capital jurisdictions, there is no discernible correlation between the presence of the death penalty and the homicide rate. *The Challenge of Crime in a Free Society, a Report by the President's Commission on Law Enforcement and Administration of Justice*, 143 (1967). Since only 24 people were executed in the United States for armed robbery between 1930 and 1962, it is impossible to establish that the death penalty for robbery acts as an effective deterrent. Bedau, ed., *The Death Penalty in America*, 116-17 (Rev. Ed. 1967). Severe penalties are no more an effective deterrent than mild penalties; rather the effective elements in deterring crime are the efficiency, uniformity, and certainty of enforcement

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(1956), discussing statutes reducing penalties for certain crimes, the court said: "There is no place in the scheme for punishment for its own sake, the product simply of vengeance or retribution." See also, *In Re Estrada*, 63 Cal. 2d 740, 745, 408 P. 2d 948, 951-952, 48 Cal. Rptr. 172, 175-176 (1965).

through apprehension and conviction. See Att. Gen. Clark, Hearing on S. 1760, Subcomm. on Criminal Laws and Procedures, Senate Judiciary Committee (July 2, 1968).

Alabama, which retains the death sentence, has one of the highest murder rates in the nation (12.9 per 100,000) while Maine, which does not employ the death sentence, has one of the lowest rates in the nation (1.1 per 100,000). Even when one compares states with similar sociological conditions there is no correlation between retention of the death penalty and the murder rate. This indicates "that the homicide rate is indifferent to the presence or absence of capital punishment." See Schuessler, "The Deterrent Influence of the Death Penalty," *Annals*, November, 1952, at 57-58.

Although there are no reliable statistics to assess the impact of the death penalty on robbery it is reasonable to assume that the situation would not vary greatly from homicide.

Thus, unless the state can demonstrate a compelling interest to justify retention of the death penalty, a penalty less than death will better serve societal needs. Abrogation of the death penalty will provide the state with an opportunity to rehabilitate the petitioner, enable him to conform his future conduct to acceptable standards, and become a useful and productive citizen.

## II.

## The Supreme Court of Alabama Failed to Protect Petitioner's Right to Due Process With Regard to His Plea of Guilty.

### A. A Guilty Plea to Be Effective Must Be Made Voluntarily, Knowingly, and Intelligently.

A plea of guilty is the most serious form of confession which a defendant can make because it admits the truth of all the allegations in an indictment. See *Kercheval* v. *United States*, 274 U.S. 220, 223 (1927) ("A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction").

This Court has long recognized that due process requires that "a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." *Ibid.* See also *West* v. *Myers*, 423 Pa. 1, 5-6, 22 A.2d 919, 921 (1966) ("The concept of fairness and justice embodied in the due process clause . . . is incompatible with the practice of permitting convictions based upon guilty pleas not made voluntarily . . . and no plea can be viewed as voluntary that is the product of ignorance").

A trial judge has an affirmative, constitutional duty to ascertain whether or not a guilty plea was voluntarily made. Reliance on the defendant to raise objection would make a mockery of the right to due process since the same factors which produce an involuntary confession—fear or ignorance, for example—would also prevent any such objection being made. Cf. *Carnley* v. *Cochran*, 369 U.S. 506, 514 (1962). This affirmative duty is especially crucial in

a capital case because, for example, an innocent defendant motivated by fear of the supreme penalty might plead guilty hoping to placate the authorities and avoid the horror of his own death. Cf. *United States* v. *Jackson*, 390 U.S. 570 (1968) ("... the evil in the federal statute (making possible the death penalty only after a plea of not guilty) is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them").

In an analogous situation, *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court held that a confession is inadmissible until the prosecution establishes that it was voluntarily given. *A fortiori* voluntariness must be established as a prerequisite for the acceptance of a guilty plea which is a far more serious confession than the extra-judicial statements considered in *Miranda*. See *Kercheval* v. *United States*, *supra*.

Indeed, the due process requirements reflected in *Miranda* apply with greater force to a guilty plea because they are easier for a trial court to implement. Ascertainment of voluntariness is made in court before the judge and does not require him to investigate an event not under his control and remote in time and place. Additionally, it cannot be argued that this application of *Miranda* to guilty pleas would interfere with expeditious police investigation.

The foregoing considerations have vital relevance to the case at bar; not only is there a real doubt here whether Petitioner voluntarily, knowingly and intelligently plead guilty but also the record is entirely inadequate to permit an appellate court properly to review this fundamental question. Why would anyone plead guilty to a capital offense except as a matter of trial strategy (for example,

pursuant to an agreement with the prosecutor not to seek the death penalty)? This incongruity disturbed the three dissenting judges below. See A 41. Was Petitioner adequately advised when his court-appointed lawyer had only three short days between appointment and the time Petitioner entered his guilty plea, A 3-4, in which to identify and interview all the witnesses to five separate crimes, review the charges and prior proceedings in light of the applicable law, reflect on the awesome implications of the death penalty, consult with the prosecutor and his client, and do all the myriad other tasks necessary? All that an appellate court has to aid it in resolving these basic questions is a single, pro forma and altogether uninformative sentence in the record:

> "This day in open court came the State of Alabama by its District Attorney and the defendant in his own proper person and with his attorney, Evan Austill, and the defendant in open court on this day being arraigned on the indictment in these cases charging him with the offense of robbery and plead guilty." (A 4)

B. The Supreme Court of Alabama Erred in Holding That Petitioner's Guilty Plea Was Voluntarily Made.

The holding of the Supreme Court of Alabama is obscure because of the silence of three of the judges in the four man majority. There seem to be at least three possible interpretations of the holding, however, and analysis of each shows reversible error.

First, it is possible that the Supreme Court of Alabama held that a trial judge has no affirmative duty to investi-

gate the voluntariness of the plea unless irregularities are apparent. In his dissenting opinion, Goodwin, J., coupled his favorable reference to the rule that a trial judge "must see to it . . . that the plea is entirely voluntary", with his apparent misgivings about the merits of this particular case (A 41). This juxtaposition might suggest that the judge has a duty to investigate voluntariness only when reasonable suspicions are aroused as here.

Referring to the language quoted above by the dissent, Lawson, J., concurring, finds that it is to the same effect as an Alabama case which provided that "(i)f it *appears* that a guilty plea is the product of coercion, . . . it is void . . ." (emphasis added) (A 40). If Judge Lawson intended to stress the italicized word, the concurring opinion might give strength to the view that the Alabama Court found that no duty to investigate arises until there is some reason to suspect involuntariness.

In light of the constitutional principles discussed in the preceding section of this Point, *supra,* it would clearly be reversible error if the Supreme Court held that a trial judge need not ascertain voluntariness unless and until his suspicions are aroused.

Second, the opinion of the Supreme Court of Alabama could be read to hold that, since the record is silent, it must be assumed that the guilty plea was voluntary. In his concurring opinion, Lawson, J., states:

> "The record contains nothing to indicate that Boykin's plea of guilty was not voluntarily and knowingly made or that it was the product of coercion, either mental or physical, or was unfairly obtained or given through ignorance, fear or inadvertence. For aught appearing,

the plea was entirely voluntary and Boykin fully realized and was competent to know and understand the possible consequences of such a plea. In briefs filed here on behalf of Boykin, by counsel who did not represent him at the trial below, it is not contended that Boykin did not voluntarily and knowingly enter the plea of guilty or that he did not fully realize the possible consequences of such plea." (A 39)

This interpretation would present a situation analogous to that in *Carnley* v. *Cochran*, 369 U.S. 506 (1962) where this Court found it improper for an appellate court to presume from a silent record the voluntary waiver of the right to counsel, saying:

"Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer." *Id.* at 516.

The *Carnley* rationale is controlling here, if the Supreme Court of Alabama held that the voluntariness of a guilty plea may be inferred from a silent record. The assumption necessary to sustain such a holding would have to be that none objected because there were no objections, but this presumption is vitiated when it is realized that the very forces which produce an involuntary plea (e.g. fear or ignorance) would continue through the trial, prevent the defendant from objecting, and thereby account for the silent record. See, *Id.* at 514.

Third and last, the opinion of the Supreme Court of Alabama could be read to hold that while the trial judge must investigate, the trial record need not affirmatively

show that a guilty plea was entered voluntarily. Parts of the concurring and dissenting opinions might be interpreted to indicate the court felt this to have been the issue before it. (A 39-40 and 41, respectively.)

The due process guarantee of a fair trial includes within it the guarantee of fair and meaningful appellate review. This principle, in cases involving protection of substantial constitutional rights, has led to the requirement that the trial court develop an adequate record to facilitate such appeal. For example, in *Johnson* v. *Zerbst*, 304 U.S. 458, 465 (1938), the Court said:

> "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused. . . . is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver (of counsel) by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record."

Subsequent cases have not interpreted the last quoted clause to be precatory, for it is now well established that a trial court has an affirmative duty to make a record concerning the voluntariness of waiver of counsel. See, for example, *Glasser* v. *United States*, 315 U.S. 60, 71 (1942); *Kaplan* v. *United States*, 375 F. 2d 895 (9th Cir.), *cert. denied* 389 U.S. 839 (1967); and *United States* v. *Moriarty*, 375 F. 2d 901 (7th Cir.), *cert. denied* 388 U.S. 911 (1967). If due process requires the trial court to make a record

with respect to the voluntariness of a waiver of the right to counsel, it surely must impose a similar requirement with regard to the voluntariness of a guilty plea. At least one court has so held. *Woods* v. *Rhay*, 68 Wash. 2d 601, 414 P.2d 601, *cert. denied* 385 U.S. 905 (1966).

The rule here urged reinforces the constitutional guarantee against self-incrimination and, additionally, common sense tells us that the enormity of the implications of a guilty plea entitle the voluntariness thereof to be subject to every possible procedural safeguard.

There is no merit to the suggestion of the concurring judge (A40), that the trial court need not make a record as to voluntariness of a guilty plea on the theory that Petitioner can raise the same questions in a collateral proceeding. Forcing such a proceeding on Petitioner would be unnecessarily prejudicial to him. Failure to obtain proper stays of execution before adjudication of the issue would result in Petitioner's death. Furthermore, as the constitution does not guarantee Petitioner the right to counsel in certain collateral procedures, *e.g.*, *Douglas* v. *Maxwell*, 357 F.2d. 320 (6th Cir.), *cert. denied* 385 U.S. 858 (1966) (habeas corpus), Petitioner's indigency might prevent him from obtaining counsel and thereby effectively deny him the power to bring such a proceeding. Also, since the question of voluntariness can be resolved on appeal, to require a collateral proceeding would only place added burden on the court.

## III.

**The Sentence of Death Imposed on the Petitioner by the Alabama Jury Violates the Due Process Clause of the Fourteenth Amendment.**

The law of Alabama dealing with robbery as a capital crime does not purport to establish any standards by which a jury is to exercise its discretion in capital sentencing. Code of Ala., Tit. 14, §415 (1959), provides that:

> "Any person who is convicted of robbery shall be punished, at the discretion of the jury, by death, or by imprisonment in the penitentiary for not less than ten years."

The Constitution forbids a degree of vagueness in criminal statutes which "licenses the jury to create its own standard in each case." *Herndon* v. *Lowry*, 301 U.S. 242, 263 (1937). Such vagueness leaves room for arbitrariness and suasion by impermissible considerations. *NAACP* v. *Button*, 371 U.S. 415 (1963); *Freedman* v. *Maryland*, 380 U.S. 51 (1965).

*Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966) supports, if it does not compel, the conclusion that unfettered jury discretion in capital cases is unconstitutional. What was at issue there, as here, was a state practice governing disposition, not describing the elements of an offense. No "fair notice" problem was involved—except, of course, the problem that it was impossible for defense counsel at trial to know what issues he was trying, as it is in a capital case tried before a jury having limitless sentencing power. No First Amendment or other Federal rights demanding the special protection afforded by a heightened requirement

of statutory specificity, see *United States v. National Dairy Products Corporation*, 372 U.S. 29, 36 (1963), were involved in *Giaccio*. That decision turns squarely on the proposition that the Fourteenth Amendment forbade Pennsylvania to leave its "jurors free to decide, without any legally fixed standards, . . ." see 382 U.S. 402-403, whether to impose upon a defendant a rather small item of cost. In the infinitely more significant matter of sentencing a man to death, an Alabama jury should not be permitted the same lawless and standardless freedom.

Indeed, the dangers implicit in unbridled discretion in imposing punishment are illustrated in the grim history of the discriminatory use of the death penalty in the United States. Of those convicted of intentional homicide only about one per cent are executed. This one per cent is almost universally poor, friendless, and black as has already been shown. See, Point I, *supra*. Alabama has reserved the death penalty for robbery exclusively for Negroes and eighty per cent of all executions in that state have been imposed on Negroes. *Ibid.*

The Task Force Report on The Courts of The President's Commission on Law Enforcement and Administration of Justice (1967) concluded (at p. 23) that "(t)he existence of unjustified disparity (in sentencing) has been amply demonstrated . . ."

The gross injustice which the President's Commission found at all levels of sentencing is peculiarly intolerable when it affects the application of the death penalty. This Court recently noted that "much more is involved . . . than a simple determination of sentence . . . (because the jury must) answer 'yes' or 'no' to the question whether this

defendant was fit to live". *Witherspoon* v. *Illinois*, 391 U.S. 510, 520.20 (1968). Even if the imprecision of the sentencing art and complexity of sentencing goals must allow for some degree of discretion in deciding between different fines or terms of years, the degree of arbitrariness allowed a state is not so liberal where grave and irremedial punitive exactions are at stake, see *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942) and none is graver or more irremediable than the sentence of death. The "basic requirements of procedural fairness can(not) be ignored . . ." *Witherspoon* v. *Illinois, supra.*

Here, the range of discretion granted to the Alabama jury by statute was impermissibly broad. They were invited to choose, in their absolute discretion, between such disparate punishments as ten years imprisonment or death.

The trial court provided the jury with no guidance whatsoever to help them decide whether the Petitioner should live or die. By his apparent indifference to the need for sentencing standards, the judge allowed the choice between life and death to be made for any reason, rational or irrational, or for no reason at all. His charge gave no assurance that there would be the slightest connection between the sentence and any permissible justification for enacting it:

> "The Court: Some of you gentlemen were on the (fol. 23) jury yesterday, but I've got to briefly restate the law as to what robbery is. This defendant has plead guilty to robbery in five separate and independent cases. Now, robbery, once again gentlemen, is the felonious taking of money or goods of value from another against his will and without his permission by violence or by putting him in fear. That

boils it down in a nut shell just what robbery is. Now, it carries from ten years minimum in the penitentiary to the supreme penalty of death by electrocution. I'll have the forms for you in just about one minute. One form has been written up here. If you decide not to give death by electrocution, of course, the form on the indictment you can use that. On the other hand, gentlemen, there will be a form—I'll send it to you in the jury room—where if the jury finds the defendant guilty of the offense of robbery as charged in the indictment and fixes the penalty at death by electrocution. You will have that form. You can use either one form or the other when you arrive at your verdict. Do you have any exceptions as to what the court has said?

Mr. Austill: No, sir.

Mr. Pfleger: None for the State. (A 32)

To make a choice between a relative minor prison term and the absolute extinguishment of life without any standards invites irrationality, caprice, and invidious discrimination. Cf. *Skinner* v. *Oklahoma, supra*. The jury have acted wilfully and unreviewably,* without standards and without direction.

The imposition of the death penalty on the Petitioner pursuant to such an arbitrary procedure is unconstitutional.

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*Alabama courts have recently reaffirmed that the exercise of discretion under the robbery sentencing statute is within the exclusive preserve of the jury and its decision cannot be reviewed or modified by the courts. See *Wilson* v. *State*, 268 Ala. 86, 105 So. 2d 66 (1958), and *Argo* v. *State*, 43 Ala. App. 546, 195 So. 2d 901 (1967).

## Summary and Conclusion

Review of errors predicated on the judgment and opinion of the Supreme Court of Alabama in the instant proceeding is vital and necessary if we, as a Nation, moored to sound principles of jurisprudence, are to rise above the tide of out-moded procedures and doctrinaire visage. The meaningful provisions of the Eighth and Fourteenth Amendments to our Constitution do not reflect a vacuous dubidity or abstractional commitment, but, rather, are instruments mirrored to this Country's evolving concept of decency and fairness. The trend toward the abolition of the death penalty is one facet of the outlook within this developing society. And pointedly, with regard to the Petitioner, Edward Boykin, Jr., stripped of the impractical realities that have brought him to this time and place, the crimes for which he awaits execution neither call for nor require society's measure to be so greatly disproportionate.

It is also contended that procedural safeguards within an enlightened and vitalizing juridical framework will make more certain and effective the rights with which the individual citizen is clothed. That his liberty, or his property, or in this case, his very life, will not be denied without a clear confirmation of those guarantees.

For the reasons stated, the judgment appealed from should be reversed.

Respectfully submitted,

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